IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DONALD D. BROWN, **Plaintiff,** **vs.** **JO ANNE B. BARNHART[1], COMMISSIONER OF SOCIAL SECURITY,** **Defendant.**	**No. 01CV4064** **ORDER**

Plaintiff, Donald D. Brown, filed a Complaint in this Court on June 21, 2001, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq*. and 1381 *et seq*. This Court's duty is to review a final decision by the Commissioner. 42 U.S.C. §405(g). For the reasons set out herein, the Commissioner's decision is reversed and the matter is remanded to the Commissioner for further development of the record.

I. BACKGROUND

Plaintiff filed concurrent applications for Title II

[1]Jo Anne B. Barnhart became the Acting Commissioner of Social Security on November 14, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Jo Anne B. Barnhart should be substituted for Larry G. Massanari as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §405(g).

disability insurance benefits and Title XVI supplemental security income benefits on September 8, 1997 claiming to be disabled since February 1, 1991[2] (Tr. 11). His applications were denied initially and on reconsideration on December 9, 1997 and May 14, 1998 (Tr. 11). On February 17, 2000, following a hearing, an Administrative Law Judge (ALJ) determined that plaintiff was not disabled through the date of the decision. A complaint was filed in this Court on June 21, 2001.

In his decision, following the familiar five step sequential evaluation set out in Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984), the ALJ, at the first step, found that plaintiff had not engaged in substantial gainful activity after his alleged onset disability date of February 1, 1991 (Tr. 12). At the second step, the ALJ found that plaintiff had "severe" impairments which are: degenerative disc disease of the cervical spine and degenerative disc disease of the lumbar spine. (Tr. 16, 23). At the third step, the ALJ found that plaintiff's impairments do not meet or equal the criteria of a listed impairment listed in Appendix 1 to Subpart P of the Social Security Administration's Regulations No. 4 (Tr. 16, 23). At the fourth step, the ALJ did not find plaintiff's testimony, regarding his inability to perform virtually all type of work activity on a sustained basis, to be credible. (Tr. 22). The ALJ, therefore, concluded that plaintiff's impairments do not

[2]Plaintiff's insured status expired on December 31, 1994. In order to be entitled to disability benefits under Title II, Plaintiff must show that he was disabled between February 1, 1991 and December 31, 1994.

prevent him from performing his past relevant work as a telephone solicitor. (Tr. 23)

II. MEDICAL EVIDENCE

The medical reports that are a part of the record of this case have been carefully reviewed by this court. A summary of those reports, taken from the certified record, follows.

The medical records show that plaintiff was seen in May 1983, by Dr. Horst G. Blume, for neck and back pain and shoulder discomfort related to several work-related injuries. X-rays revealed a Grade II spondylolisthesis[3] at L5 over S1. (Tr. 192). Diagnostc testing and surgical intervention was mentioned in order to rule out the possibility of cervical and lumbar disc pathology. Plaintiff was prescribed 29 mg of Feldene once a day and it was recommended he wear a molded low back brace. (Tr. 193). Dr. Blume wrote "[s]ince this examination is only for evaluation, the patient will need to carry out the above mentioned plan." (Tr. 193). The record does not show that plaintiff pursued the recommended diagnostic testing or that he returned for further evaluations or treatment.

The record is then silent regarding any medical treatment between 1983 and 1989. In early 1989, the plaintiff was seen at the Midtown Medical Clinic where he was treated for pneumonia. (Tr. 256). In June 1989 he was seen for low back and neck pain (not severe) and bruising in the ribs resulting from a recent

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[3]Forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum. Stedman's Medical Dictionary, 26th Ed.

altercation with the police. (Tr. 256).

The plaintiff was next seen on February 19, 1991 at the Midtown Medical Clinic for a right ankle sprain subsequent to an injury sustained while cross country skiing the previous day. (Tr. 13, 253). On July 15, 1991 the plaintiff returned with complaints of lower back pain, cough and congestion. He was diagnosed with an upper respiratory infection and prescribed an antibiotic. The plaintiff was instructed on some back exercises to help manage his low back strain. (Tr. 13, 254).

After two years of no medical treatment, the plaintiff was seen at the Siouxland Community Health Center on July 28, 1993 for left hand and wrist pain, as well as neck and back pain, subsequent to a recent injury while playing basketball. In August, it was determined that the wrist had been fractured and a thumb spike cast was applied. It was removed in September. (Tr. 14, 200, 259).

Four years later, on October 6, 1997, at the request of the Iowa Disability Determination Services, the plaintiff underwent a consultative psychiatric evaluation conducted by Philip J. Muller, D.O. Except for admitting to being occasionally depressed about his physical condition, no significant major depression or psychiatric problems were diagnosed. (Tr. 14, 201-203).

The Iowa Disability Determination Services arranged for the plaintiff to be seen by Douglas Martin, M.D. for a comprehensive examination on November 3, 1997. The plaintiff complained of neck pain and sleep disturbance. In addition, the plaintiff

reported that he had been exposed to hydrogen sulfide in his workplace in 1983 and that since then he had been suffering from headaches, shortness of breath, wheezing, coughing, numbness and tingling of the extremities, and visual disturbances. (Tr. 14, 209-212). Dr. Martin concluded that plaintiff suffers from some cervical and lumbar abnormalities and noted that the plaintiff might benefit from surgical intervention, however, no particular surgical procedure was specified. (Tr. 212). Dr. Martin also noted that:

> ... it is my opinion that this gentleman has probably sustained rather significant hydrogen sulfide exposure, which may be more than the one particular incident that he describes and actually may be a cumulative effect over the two years that he worked in that area... [i]t would be my opinion that he should be evaluated by a physician well versed in toxicology and as he has not had any of his particular symptoms treated, that would be the first step.

(Tr. 212).

On April 20, 1998, again at the request of the Iowa Disability Determination Services, the plaintiff was seen by Dr. Martin for a consultative examination. The plaintiff was examined for complaints of left elbow and left knee pain. X-rays of these areas were normal. In addition, plaintiff reported that he continued to have discomfort in the cervical and lumbar area of his back. Flexion and extension of his cervical spine were restricted to 35 degrees and 20 degrees respectively. Dr. Martin diagnosed the plaintiff with degenerative disc disease of the cervical spine; Grade II

spondylolisthesis[4] at L5-S1; mild left elbow discomfort and patellofemoral syndrome of the knee, bilaterally. (Tr. 15, 204-206). With respect to plaintiff's remaining functional capacities, Dr. Martin again opined that the plaintiff "needs to seek a physician who is well versed in toxicology to deal with the possible hydrogen sulfide problems that he has." (Tr. 206).

On July 30, 1998, the plaintiff returned to the Siouxland Community Health Center (where he was last seen in September 1993) complaining of daily headaches and insomnia since he was exposed to hydrogen sulfide in 1983. He also complained of back pain. (Tr. 15, 257). The plaintiff was told to keep a headache and sleep diary, exercise daily and avoid caffeine and napping. Tiazac was prescribed for his headaches. (Tr. 258).

III. STANDARD OF REVIEW

> The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. §405(g). See Lorenzen v. Chater, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support its conclusion. Pickney v. Chater, 71 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. Johnson v. Chater, 87 F.3d 1015, 1017 (8th Cir. 1996) (citations omitted). When evaluating

[4]See note 2, supra.

> contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's findings, this Court must affirm. Orrick v. Sullivan, 966 F.2d 368, 371 (8th Cir. 1992)(citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. Wilcutts v. Apfel, 143 F.3d 1134, 1136-37 (8th Cir. 1998) citing Brinker v. Weinberger, 522 F.2d 13, 16 (8th Cir. 1997).

III. DISCUSSION

A "claimant's residual functional capacity is a medical question." Lauer v. Apfel, 245 F.3d 700 (8th Cir. 2001), quoting Singh v. Apfel, 222 F.3d 448, 451 (8th Cir. 2000). There must be some medical evidence to support the ALJ's determination of the claimant's residual functional capacity and this evidence should address the claimant's ability to function in the workplace. Dykes v. Apfel, 223 F.3d 865, 867 (8th Cir. 2000)(per curiam); Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000).

The focus of plaintiff's claim for disability benefits are the debilitating headaches he says he has been suffering from since his exposure to hydrogen sulfide while working at Mid American Tanning Co., just south of Sioux City, Iowa, in 1983. As stated above in footnote 2, the window of time that plaintiff must show he was disabled is between February 21, 1991 and December 31, 1994.

In denying benefits, the ALJ determined that there was insufficient medical evidence to support plaintiff's alleged

hydrogen sulfide impairment, noting that plaintiff did not seek treatment for his headaches until several years after he alleges he became disabled. The ALJ stated: "...an approximate 10 year delay in seeking treatment for such complaints is unrealistic." (Tr. 20). The ALJ also focused on the fact that several of plaintiff's medical evaluations were necessitated by his own participation in sporting activities such as cross country skiing (February 18, 1991), mountain biking (July 1991) and playing basketball (July 1993). According to the ALJ, these facts coupled with the doctor's notes of July 30, 1998, from the Siouxland Community Health Center, which indicate that plaintiff's "affect and responses are appropriate except for the breadth of his complaints," (Tr. 258) "strongly suggest the Claimant has conjured up the whole hydrogen sulfide "exposure" incident." (Tr. 21). Thus, the ALJ concluded that "[f]or these reasons, the alleged hydrogen sulfide impairment is not a medically determinable impairment." (Tr. 21).

The ALJ's conclusion that the hydrogen sulfide exposure incident was "conjured up" by the plaintiff cannot be adopted by this Court. This Court, because of it's personal knowledge, is aware that two people died from hydrogen sulfide poisoning at the Mid American Tanning Co. (a leather tanning facility) a few miles south of Sioux City, Iowa in the 1980's. The question is not whether the plaintiff conjured up this incident, rather the question is whether the plaintiff was present during this incident and whether he was indeed exposed to hydrogen sulfide. If he has been exposed to hydrogen sulfide there would probably be a workers compensation claim that should be fully inquired

into. In the experience of the Court, the claimant would be seen by a "company" doctor who should have a record of any visits or treatment the plaintiff had. The Court is therefore persuaded that this case should be remanded so that the plaintiff and his attorney, as well as the ALJ who also has a duty to fully develop the record, can make an informed determination as to whether the plaintiff was exposed to hydrogen sulfide as he claims.

Further, this Court is persuaded that this case should be remanded because the ALJ failed to carefully consider Dr. Martin's statements about plaintiff's exposure to hydrogen sulfide. As stated previously, Dr. Martin concluded that the plaintiff had probably sustained significant hydrogen sulfide exposure and he recommended, on two separate occasions, that plaintiff be examined by a physician well versed in toxicology. (Tr. 206, 212). Dr. Martin made it clear that he was not the right doctor to evaluate plaintiff's complaints relating to a hydrogen sulfide exposure. Just as a claimant is sent to a psychiatrist to be evaluated for depression or other mental illness, a claimant who has probably suffered exposure to hydrogen sulfide should be evaluated by a physician specialized in toxicology.

The ALJ discredits the plaintiff for not following up on Dr. Martin's recommendation to see a toxicologist, stating that "[e]xcept for a lack of finances, the undersigned finds the Claimant's rationale for failure to seek treatment are unreasonable and, therefore, not credible." (Tr. 18). This Court, however, finds that the ALJ did not adequately inquire

into and/or explain why the Iowa Disability Determination Services, which had arranged for the plaintiff to be seen my Dr. Martin, did not arrange for the plaintiff to be examined by a toxicologist, especially after Dr. Martin, the state agency physician, recommended it on two occasions. Whether the plaintiff was or was not in a position financially to seek an evaluation from another doctor should not be relevant. At the time the plaintiff was seen by Dr. Martin he had already filed his claim for disability benefits and it should have been arranged for him to see a toxicologist so that there would be a full record as to plaintiff's basic claim.

Since Dr. Martin was unable to provide the necessary evidence to establish whether or not the plaintiff meets a listed impairment due to his exposure to hydrogen sulfide, the plaintiff should be referred to a specialist in toxicology for an examination and opinion.

IT IS THEREFORE HEREBY ORDERED that this case be remanded to the Commissioner, pursuant to sentence four of 42 U.S.C. § 405(g), for further development of the record, including but not limited to a determination as to whether or not the plaintiff was present and was exposed to hydrogen sulfide, whether or not workers compensation was involved, for a complete medical examination by a qualified toxicologist, and a new decision setting out precise answers to these questions.

The judgment to be entered will trigger the running of the time in which to file an application for attorney's fees under 28 U.S.C. §2412(d)(1)(B)(Equal Access to Justice Act). See Shalala v. Schaefer, 509 U.S. 292 (1993) and LR 54.2(b).

IT IS SO ORDERED.

DATED this ___ day of April, 2002.

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Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa